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No. 92-1736

In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

vs.

PARKS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the Federal Hazardous Substances Act, 15 U.S.C. §1261, *et seq.*, and its corresponding regulations, 16 C.F.R. Part 1500, *et seq.*, pre-empt personal injury claims based on an alleged failure to include a warning on a product label, where the label's warnings comply with the requirements of the Federal Hazardous Substances Act and its regulations.

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Respondent, Parks Corporation (Parks), respectfully requests that petitioner's request for a writ of certiorari to the Fourth Circuit Court of Appeals be denied.

OPINIONS BELOW

The order of the District Court of South Carolina (petitioner's appendix 20a-25a) is not officially reported. The opinion of the Fourth Circuit Court of Appeals (petitioner's appendix 1a-15a) is reported at 985 F.2d 736 (4th Cir. 1993).

JURISDICTION

Contrary to petitioner's assertion, this Court does not have jurisdiction to entertain the writ pursuant to 28 U.S.C. § 1257. Instead, jurisdiction for the review of this case is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

15 U.S.C. § 1262(b) "Declaration of hazardous substances" provides:

> If the Commission finds that the requirements of section 1261(p)(1) of this title are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, it may by regulation establish such reasonable variations or additional label requirements as it finds necessary for the protection of the public health and safety; and any such hazardous substance intended, or packaged in a form suitable, for use in the household or by children, which fails to bear a label in accordance with such regulations, shall be deemed a misbranded hazardous substance.

16 C.F.R. § 1500.3(c)(6)(iii) "Definitions" provides:

> The term *combustible* shall apply to any substance having a flashpoint at or above 100°F (37.8°C) to and including 150°F (65.6°C) as determined by the test method described at § 1500.43a, . . .

16 C.F.R. § 1500.14 "Products requiring special labeling under section 3(b) of the act" provides:

> (a) Human experience, as reported in the scientific literature and to the Poison Control Centers and the National Clearing House for Poison Control Centers, and opinions of informed medical experts establish that the following substances are hazardous:
>
> * * *
>
> (3) Products containing 5 percent or more by weight of benzene (also known as benzol) and products containing 10 percent or more by weight of toluene (also known as toluol), xylene (also known as xylol), or petroleum distillates such as kerosene, mineral seal oil, naphtha, gasoline, mineral spirits, stoddard solvent, and related petroleum distillates.
>
> (b)(3)(ii) Because products containing 10 percent or more by weight of toluene, xylene, or any of the other substances listed in paragraph (a)(3) of this section may be aspirated into the lungs, with resulting chemical pneumonitis, pneumonia, and pulmonary edema, such products shall be labeled with the signal word "danger", the statement or hazard "Harmful or fatal if swallowed," and the statement "Call physician immediately."

16 C.F.R. § 1500.121 "Labeling requirements" provides:

> (a)(1) *Background and scope.* Section 2(p)(1) of the Federal Hazardous Substances Act (FHSA) or "the Act"), 15 U.S.C. 1261(p)(1), requires that hazardous substances bear certain cautionary statements on their labels. These statements

include: signal words; affirmative statements of the principal hazard(s) associated with a hazardous substance; the common or usual name, or chemical name, of the hazardous substance; the name and place of business of the manufacturer, packer, distributor, or seller; statements of precautionary measures to follow; instructions, when appropriate, for special handling and storage; the statement "Keep out of the reach of children" or its practical equivalent; and when appropriate, first aid instructions.

(a)(2)(vii) *Statement of principal hazard(s)* means that wording descriptive of the principal or primary hazards associated with a hazardous substance required by section 2(p)(1)(E) of the Act. Some examples of such statements are "HARMFUL OR FATAL IF SWALLOWED," "VAPOR HARMFUL," "FLAMMABLE," and "SKIN AND EYE IRRITANT."

STATEMENT OF THE CASE

Statement of Facts

Pursuant to Supreme Court Rule 15.1, Parks takes issue with petitioner's statement of the case. On March 16, 1989, petitioner was injured while allegedly using Parks 100% mineral spirits to clean paint spills in the bedroom of his rented residence. Prior to using the Parks product, petitioner read the labeling on the front and the back of the plastic bottle of mineral spirits. *Moss v. Parks Corporation*, 985 F.2d 736, 737 (4th Cir. 1993). The label (petitioner's appendix at 26a-27a) contains warning language including, among other information, the words

"DANGER!", "COMBUSTIBLE", "KEEP AWAY FROM HEAT AND OPEN FLAME", and "USE ONLY WITH ADEQUATE VENTILATION". After reading the label, petitioner poured two pints of the mineral spirits on the floor and began scrubbing to remove what he called paint "overspray." Under petitioner's theory, the scrubbing created a mist which wafted across the room, over a hallway outside the room and into another room.

While there was allegedly a kerosene heater in the room across the hall, petitioner testified that the heater was off while he was painting and cleaning. After Moss began scrubbing, a flash fire occurred which caused his injuries. The fire caused localized damage to the room petitioner painted. No explosion occurred. Petitioner's theory of the fire is the "pilot light" of the kerosene heater ignited the mineral spirits.

Proceedings in the District Court and Fourth Circuit

Petitioner filed suit in December, 1990 alleging a single cause of action for failure to warn. Parks answered and later moved for summary judgment in October, 1991. Petitioner then amended his Complaint alleging five causes of action based on failure to warn. He claimed Parks' label was misbranded because it failed to comply with the labeling requirements of the Federal Hazardous Substance Act, 15 U.S.C. § 1261, *et seq.* (hereinafter "FHSA").

On February 24, 1992, Parks renewed its motion for summary judgment as to petitioner's claim. Parks argued petitioner's failure to warn claim was pre-empted by the FHSA. At the hearing on the motion, the District Court found the warning on the Parks' bottle complied with the

FHSA and the regulations promulgated thereunder, and the FHSA pre-empted all causes of action based on a failure to warn. On March 3, 1992 the District Court entered summary judgment in favor of Parks.

Petitioner appealed the District Court's dismissal of his case by filing a notice of appeal on March 17, 1992. The Fourth Circuit Court of Appeals issued a ruling on January 28, 1993. The court held the paint thinner was properly labeled in accordance with the applicable federal standards. In coming to this conclusion, the Court found that where a plaintiff seeks a labeling requirement more stringent than those in the FHSA, his action is pre-empted. The Court further found the Parks' warning complied with the requirements of the FHSA. The Court rejected the argument that a *jury* should be allowed to determine the adequacy of precautionary labeling already addressed in detail by the FHSA and its corresponding regulations. Accordingly, the Court affirmed judgment in favor of Parks. *See, Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir. 1993). Petitioner did not move for rehearing or rehearing *en banc* of the holding. Petitioner filed this petition on April 28, 1993 and Parks' counsel received it on April 30, 1993.

SUMMARY OF ARGUMENT

This Court should decline to grant the petition for four fundamental reasons. While, on the surface, it appears there is a conflict among the Second, Fourth, and Ninth Circuits regarding the pre-emptive nature of the

FHSA, an analysis of the facts of the cases cited by petitioner from the Second and Ninth Circuits reveals there is no conflict. Instead, *Moss v. Parks Corporation* provides a clear and reasoned interpretation of the pre-emptive nature of the FHSA in the context of a state law tort claim for inadequate labeling. The two cases cited by petitioner do not deal with tort claims or inadequate labeling under the terms of the FHSA.

In holding the FHSA pre-empts state law tort claims where the manufacturer has complied with federal labeling requirements, the Court of Appeals in *Moss* relied on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). Contrary to the assertions of the petitioner, there is no widespread confusion among the appellate courts regarding the interpretation of the decision in *Cipollone*. Since that ruling, there have been a number of well-reasoned decisions applying the rule of *Cipollone* finding that state law tort claims are pre-empted.

As part of the holding in *Moss*, the Court of Appeals found the mineral spirits product was properly labeled under the terms of the FHSA. *See, Moss*, 985 F.2d at 742. The petitioner's Complaint and subsequent appeal challenge the adequacy of the labeling developed by the Consumer Product Safety Commission ("CPSC") through research and testing. Despite the finding of the court and the clear language of the statute, petitioner claims the labeling is "meager and inadequate" (petitioner's brief at 21 and 24.) Because petitioner is challenging the adequacy of the labeling, his claim falls squarely within the FHSA's regulatory scope and pre-emptive field. The Fourth Circuit found claims such as petitioner's would directly conflict with the regulatory requirements of

FHSA and violate the legislative intent in the preemptive provision, 15 U.S.C. § 1261, note (b)(1)(A). It was intended that state law labeling requirements must be "identical" to the requirements of the federal law, in order to provide uniformity throughout the nation. The holding in *Moss* does not prevent a state from enacting a statute or administrative regulation which is identical to that contained in the FHSA.

Finally, there is no reason for the Court to consider petitioner's claims regarding the Fourth Circuit decision's effect on state hazardous substances statutes. The Fourth Circuit was faced with the uncertainty of a state common law jury verdict, not the specificity of a state statute. The facts of petitioner's case do not call upon the Court to analyze any of the individual state statutes in order to properly rule on this case. Finally, because each state statute differs in its breadth and scope, this case would not present an adequate forum in which to specifically address each of the statutes.

ARGUMENT

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL.

The FHSA pre-emption of state law tort claims for inadequate labeling has not created a widespread controversy among appellate courts. Nevertheless, petitioner claims a conflict exists among the federal circuits based on two cases that focus on other aspects of the FHSA. Each of the cases cited by petitioner deal not with a state common law claim for inadequate labeling but, instead,

address a challenge to a state statute requiring warnings in a different context than that presented by petitioner's claim.

In *Chemical Specialties Manufacturers Association v. Allenby*, 958 F.2d 941 (9th Cir. 1992), cert. denied, 113 S.Ct. 80 (1992), the Ninth Circuit took up a trade association's challenge to California's point of sale warnings. When California adopted its Safe Drinking Water and Toxic Enforcement Act (Proposition 65), the law required certain substances must provide warnings to the public regarding the health risks of the product. The issue in *Allenby* was whether a point of sale warning is labeling subject to the pre-emptive provisions of the FHSA. The *Allenby* court analyzed whether the point of sale warnings were "cautionary labeling". The issue under consideration had nothing to do with labels on products. The Ninth Circuit held "that the term 'labeling' does not apply to the point of sale signs required under Proposition 65." *Id.* at 946. Since the point-of-sale warnings were not labeling on the product, the Ninth Circuit concluded the pre-emption provisions of the FHSA did not apply.

While no pre-emption was found under that set of facts, the Ninth Circuit recognized the pre-emptive scope of the FHSA labeling requirements. The court, agreeing with the manufacturers association, recognized the FHSA "expressly pre-empts all state mandated precautionary labeling that is not identical to that required by the Act." *Id.* at 949. Under this rationale, there is no conflict between the decision in *Moss* and the holding in *Allenby*

as to precautionary labeling. The Ninth Circuit also recognized the purpose of the pre-emption provision of the FHSA:

> The preemption clause in FHSA balances these competing concerns by leaving cautionary labeling requirements to the federal government while allowing states to regulate the *sale* and *use* of hazardous chemicals. Proposition 65 warnings do not constitute cautionary labeling preempted by FHSA.

Allenby, 958 F.2d at 650. (Emphasis added). The conclusions of the Ninth Circuit relating to labeling demonstrate there is no conflict between the circuits as to the preemptive scope of the FHSA.

Petitioner also relies on *Toy Manufacturers of America, Inc. v. Blumenthal,* 986 F.2d 615 (2d Cir. 1993). The issue turned on whether or not the FHSA regulated the hazard which was the subject of the Connecticut warning. At issue was a "small parts" warning for toys intended for children between the ages of three and seven and whether or not the Connecticut law was pre-empted by the FHSA. A close reading of *Blumenthal* finds there was no corresponding federal regulation which pre-empted the warning mandated by state law. The court held "preemption obtains only where a state action regulates the same 'hazardous substance' and the same 'risk of illness or injury associated with [that] hazardous substance' which a FHSA regulation regulates." *Id.* at 618. After reviewing the legislative history and the FHSA regulations adopted regarding toys, the court concluded

that there was no explicit federal regulation of the hazard. Further, the court found the decision not to regulate did not evidence a pre-emptive intent "to shut out state action". *Id.* at 623. As a result, Connecticut was free to require the warning on the toys because the federal government had not mandated a warning.

Unlike *Allenby* and *Blumenthal, Moss* dealt squarely with a product label in which the warning language was specified by the FHSA regulatory scheme for mineral spirits. Unlike *Allenby,* the Parks warning was found on the product and was "cautionary labeling". The language and warning at issue, unlike *Blumenthal,* were specifically addressed in the provisions of the Consumer Product Safety Act which specify the warning language.

Thus, while on their face *Allenby* and *Blumenthal* create a split of authority among the three federal circuits, a close reading of the facts indicates that each case is factually distinct. Further, the holdings in each case reaffirmed the principles which formed the basis for the Fourth Circuits' decision in *Moss.* There is no conflict for this Court to resolve.

II. THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE REGULATORY SCHEME OF THE FHSA TO THE PARKS MINERAL SPIRITS LABEL.

In his statement of the case, petitioner analyzes the FHSA, the legislative history, and the corresponding regulations and concludes that a portion of the labeling requirements are "largely dependent upon the soundness of the seller's judgment in deciding what to explain and

how to explain it". (petitioner's brief at p. 11). In coming to this conclusion, the petitioner does not point to any authority in support of his position that Parks misbranded the product. A simple application of the labeling requirements found at 15 U.S.C. § 1261 *et seq.* and 16 C.F.R., part 1500, to the mineral spirits product demonstrates that the product was properly labeled.

The FHSA was enacted in 1960. The express purpose of the law was to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." House Comm. on Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), reprinted in 1960 U.S.C.C.A.N. 2833. In the 1966 amendments to the Act, a limited pre-emption provision was added which preempted state labeling requirements "unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b)." 15 U.S.C. § 1261, Note (b)(1)(A).

Petitioner alleges the mineral spirits label fails to comply with 15 U.S.C. § 1261(p)(1)(F). Under this provision, a product must contain "precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary pursuant to section 1262 of this title." Section 1262 gives the Secretary of the Consumer Product Safety Commission the discretion to require additional labeling for the protection of public health and safety. Nowhere in 15 U.S.C. § 1262 is the authority to impose additional labeling requirements granted to the states or to the courts.

Labeling requirements for mineral spirits are found at 16 C.F.R. Part 1500. The regulations require the ". . . hazardous substance bear certain cautionary statements on their labels." These statements include " . . . affirmative statements of the principal hazards . . . " 16 C.F.R.§ 1500.121(a)(1). The principal hazard associated with mineral spirits is combustibility. 15 U.S.C. § 1261(p)(1)(E). The CPSC specifically defines the word "combustible" as applicable to "any substance having a flashpoint at or above 100°F (37.8°C) to and including 150°F (65.6°C) as determined by the test method described at § 1500.43(a). . . . " 16 C.F.R. § 1500.3(c)(6)(b)(iii). The flashpoint of the Parks 100% mineral spirits tested at 101.3°F (38.5°C), placing the mineral spirits in the "combustible" category pursuant to the regulations. In conjunction with this hazard, the Parks label also warns the user to "Keep away from heat and open flame" and "use only with adequate ventilation."

Under the terms of 16 C.F.R. § 1500.14, titled "Products Requiring Special Labeling Under Section 3(b) of the Act", mineral spirits are a hazardous substance which require special labeling. 16 C.F.R. § 1500.14(a)(3). The terms of subsection 1500.14(b)(3)(ii) dictate mineral spirits be labeled "with the signal word 'Danger', the statement or hazard, 'Harmful or fatal if swallowed,' and the statement 'Call physician immediately.' " These warnings, along with 15 U.S.C. § 1261(p), form the sum of required labeling for Parks mineral spirits. Petitioner has conceded Parks complied with each of these requirements under the FHSA. Nevertheless, petitioner alleges these required warnings are ambiguous and the label, drafted in accordance with federal law, is inadequate.

Under petitioner's theory, the label is deficient because it fails to adequately describe or set forth the "precautionary measures to be followed or avoided." This claim is made despite the warning "Keep away from heat and open flame," which is the hazard that allegedly caused petitioner's injuries. However, petitioner alleges the warnings should have included a reference to the scenario that he alleges occurred here, namely, the mist of the product catching fire. This ignores the breadth and scope of the federal law. The CPSC has the power, authority and duty to conduct testing and research to enable it to promulgate regulations. Labeling requirements are enacted based on the results of the testing and research. To allow a jury to conclude more or different warnings should be placed on a product label would defeat the purpose of FHSA. And, to apply a new standard in retrospect would be unfair to labelers who abide by the law and regulations they are bound to follow.

The Fourth Circuit correctly concluded where manufacturers, such as Parks, complied with federally mandated labeling requirements, the FHSA pre-empts any claim requiring more stringent labeling requirements. These labeling requirements are characterized by the petitioner as "ambiguous" and Parks' compliance is characterized as "meager and inadequate". (Petitioner's brief at pp. 21 and 24.) Petitioner's statements, standing alone do not create sufficient grounds for the Court to hear this case.

III. THERE IS NO POST *CIPOLLONE V. LIGGETT GROUP, INC.* STRUGGLE WITH THE PRINCIPLES OF PRE-EMPTION.

Petitioner maintains "lower courts have continued to struggle with pre-emption claims since this Court decided *Cipollone v. Liggett Group, Inc.*" (petitioner's brief at 18). In *Cipollone*, this Court reaffirmed three key principles related to the doctrine of pre-emption. The first is "the purpose of Congress is the ultimate touchstone." 112 S.Ct. at 2617, 2631. The *Cipollone* decision also held the terms "state law" or "state requirement" encompass not only statutes and regulations, but also common law jury verdicts. 112 S.Ct. at 2620. The Court recently reaffirmed its holding in *CSX Transportation, Inc. v. Easterwood*, 61 U.S.L.W. 4346 (U.S. April 20, 1993), citing *Cipollone* and stating a " . . . federal statute barring additional 'requirement[s] . . . imposed under state law' pre-empts common-law claims." *Id.* at 4347. *Easterwood* also held in the context of federal railroad regulation that "applicable federal regulations may pre-empt any state law, rule, regulation, order, or standard relating to railroad safety. Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *Id.* The final principle reaffirmed by *Cipollone* is that state "requirements" in conflict with federal law can have a regulatory effect. See, *Cipollone*, 112 S.Ct. at 2629, 2634.

Since this court's decision in *Cipollone*, lower courts have had a number of opportunities to re-examine the pre-emption doctrine with the guidance from this Court. As petitioner recognizes, this Court ordered two circuits to re-examine their holdings that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, *et seq.*

(hereinafter "FIFRA") pre-empted common law tort actions in light of the *Cipollone* holding. On remand, both circuits affirmed their earlier rulings that state common law warning claims were pre-empted by the terms of FIFRA. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted and judgment vacated*, 112 S.Ct. 3020 *on remand*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers*, 959 F.2d 158 (10th Cir. 1992), *cert. granted and judgment vacated sub nom, Arkansas-Platte & Gulf Partnership v. Dow Chemical*, 113 S.Ct. 314 (1993); *on remand*, 981 F.2d 1177 (10th Cir. 1993). These decisions are important in that the statutory and regulatory scheme of FHSA and FIFRA are similar. *Moss v. Parks Corporation*, 985 F.2d at 739.

In both *Arkansas-Platte* and *Papas*, circuit courts of appeal applied the decision in *Cipollone* and found common law failure to warn actions were pre-empted. The *Arkansas-Platte* Court found its first decision was "re-enforced" by *Cipollone*. 981 F.2d at 1179. More importantly, the Tenth Circuit reasoned:

> The common law standard is generic. In contrast, the FIFRA warning is prospective and specific. To the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted.

Arkansas-Platte & Gulf Partnership v. Dow Chemical, 981 F.2d at 1179. The Eleventh Circuit in *Papas* also reaffirmed its initial finding of FIFRA pre-emption after *Cipollone*. The claims of failure to warn in *Papas* were addressed:

> Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging 'should have included additional, or more clearly stated warning, those claims are pre-empted.'

Papas, 985 F.2d at 518. (Citations omitted). The application of *Cipollone* in these cases is not a source of confusion and the holdings are applicable to this case.

Even though *Cipollone* has been applied on several occasions without confusion, and this Court has since relied on it in *Easterwood*, petitioner attempts to create an issue where no issue exists. In order to do so, he cites to the District Court opinion in *Montana Pole & Treating Plant v. I.F. Laucks*, 775 F.Supp. 1339 (D.Mont. 1991). There, the District Court held FIFRA did not pre-empt state common law warning claims. While this case is currently pending before the Ninth Circuit, the District Court opinion was redered prior to *Cipollone*. The *Cipollone* case resolves many of the pre-emption issues facing the District Court. Further, the decisions in *Allenby* and *Blumenthal* do not, by virtue of their subject matter, suggest a confusion exists in the lower courts. There is no reason for the Court to re-visit the issue.

IV. THE OPINION OF THE FOURTH CIRCUIT DOES NOT INVALIDATE ANY STATE STATUTE OR REQUIRE AN ANALYSIS OF ITS EFFECT ON STATE HAZARDOUS SUBSTANCE STATUTES.

As an additional reason for granting his petition, petitioner argues the Fourth Circuit opinion would invalidate a number of state hazardous substances act statutes. In support of this contention, he cites a number of state statutes modeled after the FHSA. He contends *Moss* undermines the effect of the statutes. Petitioner is correct to the extent he states those statutes demanding some labeling requirement not identical to federal law requirements are pre-empted. This is clear not only from the language of the FHSA, but also from the holdings of *Allenby* and *Blumenthal,* relied on by the petitioner.

An examination of many of the statutes cited by petitioner reveals the extent to which they may regulate hazardous substances. For example, New Jersey Revised Statute 24:5A-4 "Application of Federal Hazardous Substances Labeling Act" provides:

> No hazardous substance subject to and conforming with the Federal Hazardous Substances Labeling Act and regulations promulgated thereunder shall be deemed to be in violation of this Act and regulations promulgated hereunder.

Many of the other statutes cited by petitioner refer to the FHSA and the regulations thereunder for interpretations and definitions. *See,* e.g., Colo. Rev. Stat. § 25-5-508 (1992); Me. Rev. Stat. Ann. Tit. 7 § 504(3) (West 1992); Mich. Comp. Laws § 286.459 (1992); Tex. Health & Safety

Code Ann. § 501.025 (West 1992); Wash. Rev. Code § 70.106.100(5) (1992).

A review of each of the statutes cited by the petitioner reveals each is unique in its breadth and scope, some fully adopting the language of the FHSA, some merely referencing it, and others establishing their own standards. Thus, each of the statutes would have to be analyzed individually to determine whether or not the pre-emptive reach of the FHSA would invalidate the particular statute. The Fourth Circuit opinion, applying the scope of the FHSA pre-emptive provisions to a state common law tort claim, not a statute, does not present the Court with a proper forum to interpret state's hazardous substances statutes. Accordingly, petitioner does not raise an important question of federal law requiring resolution by the Court. More importantly, petitioner did not raise *this* argument at the District Court or at the Fourth Circuit.

CONCLUSION

Petitioner raises no special or important reasons for reviewing the Fourth Circuit opinion in this case. Although petitioner argues the unanimous opinion of the panel was fundamentally flawed, his failure to petition for rehearing or rehearing *en banc* belies his argument. The petition should be dismissed.

Respectfully submitted,

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